APPENDIX O: MINERALS AND RELATED INTERESTS

National Mining Association. The National Mining Association (NMA)[168] contends that the proposed rules represent a significant improvement in the Board's merger procedures, provided (NMA adds) that the soundness of the regulations in practice will depend heavily on the views of the Board in the future as the Board faces new merger applications and decides on what measures would raise the bar with regard to merger benefits, merger harm, preservation of competition, enhancement of competition, and service assurance. NMA further contends that, if future rail merger applications are approved by the Board, the quality of rail services may be expected to rise for affected producers, consumers, and shippers of rail-dependent commodities such as coal, metallic ores, metals, and nonmetallic minerals.

Merger benefits. NMA contends that rail-dependent commodity producers, consumers, and shippers, in particular those served only by the merged rail carrier, must have effective access to the Board for relief from possible abuse in rates and services at the hands of the merged carrier if unable to negotiate a fair and equitable railroad transportation services contract.

Merger harm. NMA contends that recent railroad mergers have resulted in substantial losses to commodity producers and consumers due to difficulties in rail service provided by merged rail carriers during periods in which trackage, yards, equipment, crews, and management systems were becoming adjusted for unified train operations. Those problems, NMA notes, created financial losses, as well as impediments in penetrating future markets. NMA argues that emergency relief stemming from difficulties in unifying railroad operations when implementing a merger, and recovery of losses experienced in such circumstances, should be provided for in merger approvals.

Preservation of competition. NMA contends that no railroad merger should be approved if it would diminish effective competition for moving the same commodity from the same origination to the same termination. NMA further contends that, to avert diminution of competition, the Board should impose such measures as "shared access," "open gateways," "reciprocal switching," and "trackage rights," provided (NMA adds) that such "trackage rights" do not result in a circuitous routing.

Enhancement of competition. NMA contends that the "enhanced competition" policy represents a marked advance in the Board's assessment of the merits of a rail merger.

Service assurance. NMA contends that assurance that a rail merger will not result in diminution of existing rail services, and will produce benefits in the quality of rail services,

[168] NMA, a trade association, represents the interests of the mining industry.

represents a vital controlling factor in granting approval of a merger application. NMA adds that the essential requirements in regard to service assurance are: metrics for measuring rail services post-merger vs. service levels to be provided as set forth in an adopted operational plan; monitoring of compliance by the merged carrier with commitments on post-merger services; a strategy for enabling immediate remedial actions for relief from difficulties in rail services if experienced in post-merger rail operations; and a process for recovery of damages incurred by commodity producers and/or shippers attributable to failure of the merged carrier to provide the levels of services committed to by the carrier.

NPR § 1180.1(a). NMA contends that NPR § 1180.1(a) seems to imply that the Board may approve a consolidation that reduces transportation alternatives if the transaction, at the same time, enhances transportation competition. NMA insists, however, that the Board should approve a transaction only if it will enhance, and not reduce, transportation competition.

NPR § 1180.1(c). (1) NMA contends that the "enhanced competition" concept is of pivotal importance in this rulemaking. NMA adds, however, that trackage rights may not always achieve enhanced competition. NMA explains that, although trackage rights can work in certain circumstances, trackage rights do not always furnish practical alternative routings, notably where their use involves substantially circuitous routings and/or when a second carrier for whom trackage rights are available refuses to provide reasonable services over the alternative route. (2) NMA contends: that previous mergers have caused reductions in the miles of rail trackage in service, in many cases through abandonments of trackage and right-of-ways; that further shrinkage of irreplaceable rail access could result in seriously adverse impacts on a growing economy and on our national security and mobility needs as these relate to line-haul rail corridors in various rail service areas; and that rail-dependent movements (e.g., coal and non-fuel minerals supplied by mines) must not become impeded by further reductions in rail infrastructure. NMA insists that this matter should be taken into account when rail carriers submit merger proposals.

NPR § 1180.1(g). NMA indicates that it strongly supports the Board's proposed formal oversight process to be effectuated for at least 5 years of merger implementation, including periodic carrier reports on compliance with commitments made in the course of seeking Board approval of a merger transaction.

NPR § 1180.1(h). NMA contends that the requirement for filing a service assurance plan with the merger application and railroad operational plan, incorporating problem resolution teams and procedures for resolving post-merger problems, is fundamental in the interest of realistically defining and evaluating performance requirements. NMA adds that it has a keen interest in the possibility of having mining industry representation on the NPR § 1180.1(h)(3) Service Council.

U.S. Clay Producers Traffic Association. The U.S. Clay Producers Traffic Association, Inc. (USCPTA), which represents clay producers, applauds the NPR for implicitly recognizing that merger applicants are legally responsible for the damages caused by merger-related service disruptions and for requiring that applicants establish problem resolution teams to ensure that claims are promptly addressed. USCPTA contends, however, that the NPR does not propose a complete remedy for service disruption problems. USCPTA contends, in particular, that, whereas USCPTA (in its ANPR comments) proposed implementation of a formal administrative procedure in which damages for service harm could be awarded in appropriate circumstances, the NPR opts instead for an informal, non-binding procedure that in reality is nothing more than supervised negotiation. USCPTA insists that, because the Board's sole reliance on informal procedures to address damage issues is insufficient, the Board should provide a well-defined administrative remedy that specifically mentions the Board's authority to award damages in appropriate cases.

(1) USCPTA contends that the Board is moving in the right direction by requiring merger applicants to submit detailed service assurance plans and by recognizing that greater attention must be given to the potential for transitional service harms. The requirement for submission of detailed service assurance plans, USCPTA argues, will force applicants to engage in a realistic analysis of the operational issues before the transaction is consummated. USCPTA argues, however, that simple attention to or monitoring of merger-related service disruption claims is meaningless in the absence of an enforcement mechanism, which USCPTA believes should be accomplished through an administrative procedure. USCPTA contends that, if applicants are aware of the possibility of substantial damage awards compensating shippers for harm experienced as the result of a merger, they will be less likely to proceed before all the details are well planned out.

(2) The NPR, USCPTA argues, does not explain what will happen if the railroads do not honor service disruption damage claims. USCPTA, which believes that the Board clearly has the legal authority to adjudicate damage claims arising from mergers to the same extent it has authority to impose conditions, contends that a formal administrative proceeding would provide a more straightforward and direct way of ensuring that claims are properly addressed than the informal procedures proposed by the Board. USCPTA therefore argues that 3 changes should be made to the proposed regulations. First, USCPTA argues that NPR § 1180.1(g) should be revised to provide that, during the oversight period, the Board will retain jurisdiction to impose any additional conditions, including the award of damages, it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction. Second, USCPTA argues that NPR § 1180.1(h)(1) should be revised to provide that the levels of adequate service that applicants represent in their SAPs will be binding and that they will be held liable for any failure to meet such service levels. Third, USCPTA argues that NPR § 1180.1(h)(3) should be revised to provide that a claimant who has participated in the informal process contemplated by

NPR § 1180.1(h)(3) but who is unable to reach a satisfactory resolution may petition the Board to review the claim and award damages.

(3) USCPTA contends that the "Rail Consumer Assistance Program" announced by the Board on November 2, 2000 is a form of Board intervention in the dispute resolution process, but one (USCPTA insists) that again falls short of being a truly effective remedy. The Board, USCPTA notes, has indicated that the program "is intended to strengthen the capability of the Board to informally address those issues that cannot be satisfactorily resolved through private-sector discussions." "Surface Transportation Board News" release No. 00-42 (dated November 2, 2000). USCPTA indicates that, although it agrees that aggrieved parties should first attempt to resolve problems through discussion and negotiation, it also believes that the rules should follow the thought through to conclusion and should specifically state that the Board will get involved if the negotiations fail to resolve the dispute.

Martin Marietta Materials. Martin Marietta Materials, Inc. (MMM), which produces aggregates and magnesia-based chemical and refractory products, insists that the proposed rules are worded too vaguely, do little to correct the Board's apparent pro-merger bent, and offer shippers nothing in the way of reliable safeguards to preserve or enhance railroad competition.

(1) MMM contends: that, because the rail transportation of crushed stone, sand, and gravel has been exempted from regulation, the railroads that haul MMM's freight can dictate the terms for their handling of MMM's freight on a "take it or leave it" basis; that, therefore, the only constraint upon the railroads' setting of rates on their aggregates traffic has been competition; that, however, on account of past mergers, rail-to-rail competition for the movement of MMM's freight has all but disappeared (MMM notes that each of its quarries and stone crushing plants is served by but a single railroad); that, although some of MMM's customers are located in markets served by a second rail carrier, that (MMM insists) is irrelevant, because, particularly on account of the Board's Bottleneck decision, aggregates shipments as a practical matter cannot be interlined; and that it is therefore a matter of grave concern to MMM that the Board at a minimum preserve some semblance of intramodal competition by promulgating meaningful rules in the instant proceeding. MMM further contends that the proposed rules fall short of that objective because they contain no specific measures as to how the asserted goal of preserving and enhancing rail-to-rail competition is to be achieved. MMM argues that the unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that merger applications will be treated differently in the future than they have been in the past.

(2) MMM notes that NPR § 1180.1(c)(2)(i) requires applicants to explain how they intend to preserve competitive options such as "the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the

remainder of the movement." MMM further notes that the Board indicated, in the accompanying commentary, that "we believe that it is appropriate to protect the ability of shippers to use a transportation contract obtained to a junction point to obtain a challengeable rate quote for transportation service provided beyond the junction point." NPR, slip op. at 16. MMM insists, however, that these abstractions do nothing for shippers, because (MMM explains) although shippers are already free to negotiate rate agreements for the competitive portion of a through route, the ability of the bottleneck railroad to retaliate against the competing railroad in a situation in which their roles are reversed makes such contracts hard, if not impossible, to come by. And, MMM adds, the Board lacks the power to compel a non-merging carrier to enter into a contract with a shipper. MMM therefore insists that, in the interest of enhancing or even just preserving competition, the Board should condition every merger by requiring the merged or controlled and controlling railroads to offer, upon request of a shipper, a local or proportional rate applicable between a point it alone can serve and a point of connection with another railroad, whether or not the shipper has a contract for service by the connecting railroad, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(3) MMM contends that, in order to codify existing practice with respect to 2-to-1 shippers, the Board should condition every merger by requiring the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as a result of the proposed merger, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(4) MMM contends that, in order to afford a shipper served only by a merged or controlled and controlling railroad access to a second carrier within essentially the same switching district or terminal area (which, MMM argues, is essential if intramodal competition is to be enhanced), the Board should condition every merger by requiring the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(5) MMM argues that the goal of intramodal competitive enhancement would be well served if the rate base of the merged or controlled and controlling railroad were not inflated by an excessive price paid to effect the proposed transaction or by any extraordinary costs incurred in consummating it. MMM insists that, although the Board has previously rejected the exclusion from the carrier's rate base of the acquisition premium paid to effect the merger and the unusual costs incurred in coping with the service failures resulting from its consummation, the Board, in

promulgating its revised major railroad merger rules, is not hobbled by its precedents, particularly when a fair reading of the generally accepted accounting standards would permit the Board to reach a contrary conclusion. MMM therefore contends that the Board should condition every merger by providing that any acquisition premium paid to effect the proposed transaction and any extraordinary costs incurred in consummating it shall not be included in the merged or controlled and controlling railroads' rate bases, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

Texas Crushed Stone Company and Georgetown Railroad Company. Texas Crushed Stone Company (TCS) and Georgetown Railroad Company (GRR), which are commonly controlled, contend that the proposed rules are far too vaguely worded, do little to correct the decidedly pro-merger bent of the Board, and offer shippers such as TCS and shortlines such as GRR little in the way of reliable safeguards to preserve, much less enhance, railroad competition.

(1) TCS and GRR contend that they have been adversely impacted by past mergers, even though (TCS and GRR concede) TCS continues to have today, as it had when it opened its quarry near Georgetown, TX, in 1958, two Class I connections. TCS and GRR explain: that, in 1958, the two Class I connections were the Missouri Pacific Railroad Company (MP) and the Missouri-Kansas-Texas Railroad Company (MKT); that, in the early 1980s, MP was acquired by UP; that, in the late 1980s, MKT was also acquired by UP; that, because an unconditioned UP/MKT transaction would have had a 2-to-1 impact on TCS/GRR, SP was granted trackage rights access to a connection with GRR; that, however, SP itself was acquired by UP in 1996; that, because an unconditioned UP/SP transaction would have had a 2-to-1 impact on TCS/GRR, BNSF was granted trackage rights access to a connection with GRR; and that, therefore, just as TCS in 1958 had access to two Class I railroads (MP and MKT), TCS today continue to have access to two Class I railroads (UP and BNSF).

(2) TCS and GRR contend, however, that, even with continued access to two Class I railroads, TCS has not fared all that well (TCS and GRR indicate that, whereas in 1979 TCS shipped 55,000 carloads of crushed stone and GRR was able to maintain rates competitive with other Texas quarries serving common Gulf Coast and east Texas markets, in the past 12 months TCS has shipped only 30,613 carloads of crushed stone, and the rates of GRR and its connections are no longer competitive to many of the points heretofore served). TCS and GRR attribute their problems in this regard to two factors. First, TCS and GRR claim, major railroad mergers all too often have resulted in the loss of the middle management personnel whom shippers such as TCS had come to know and trust. Second, TCS and GRR claim, whereas TCS felt close to smaller Class I railroads like MP and MKT, it feels alienated from larger Class I railroads like UP and BNSF; and, TCS and GRR add by way of illustration, whereas TCS's traffic was important to MKT (because TCS's quarry was 1 of only 2 quarries in the area served by MKT), TCS's traffic is of lesser importance to UP (because TCS's quarry is 1 of 15 quarries served by UP).

(3) TCS and GRR contend that, as respects public interest considerations and the weighing of potential benefits and potential harm, NPR § 1180.1(c) gives insufficient attention to the interests of stockholders and shippers. The mergers of the past few decades, TCS and GRR argue, have not benefitted the railroads' stockholders; the stock prices of the surviving railroads, TCS and GRR claim, have not kept pace with stock prices in other industries. The mergers of the past few decades, TCS and GRR further argue, have not benefitted the railroads' shippers either; TCS and GRR insist that, as shippers on Class I railroads, they have seen little or no reduction in their rates owing to the economic benefits and financial gains that their mergers or acquisitions were intended to bring about (TCS and GRR claim that, although the rail industry can point to stabilized or even reduced average rates, these have come about through the Class I railroads' abandonments or sales or leases to shortline operators of marginal properties and the significant changes that have been effected in employee work rules). And, TCS and GRR argue, the real potential harm of any additional major mergers or acquisitions is that, by making big railroads even bigger, they will make the railroads even more remote from their customers.

(4) TCS and GRR, which fear that further mergers will lead to reregulation of rates and services, contend that the enactment of remedial legislation could be postponed, if not avoided altogether, if only the Class I railroads would realize that they need to treat their shortline connections as partners and not as rivals. TCS and GRR argue that the Board, in considering any future major railroad mergers or acquisitions, should not ignore the important role that shortlines potentially can play in preserving what little intramodal competition remains and, more importantly, in enhancing intramodal competition. TCS and GRR further argue that the Board should not be oblivious to the fact that the Class I railroads deal with their shortline connections to suit their own interests. TCS and GRR insist that, if shortlines are to be able to play a meaningful role in preserving and enhancing competition, the merger rules must provide for express conditions to be attached to any approvals of future major merger or acquisition proposals.

(5) TCS and GRR contend, in particular, that, to safeguard the ability of shortlines to assist in the preservation and enhancement of intramodal competition, the Board should impose the following conditions: (a) Class II and Class III railroads that connect to the merged or consolidated and consolidating carriers must have the right to compensation by the railroads for service failures related to the merger or consolidation. In addition, when the merged or consolidated and consolidating carriers cannot provide an acceptable level of service post-transaction, connecting Class II and Class III railroads must be allowed to perform additional services as necessary to provide acceptable service to shippers. (b) Class II and Class III railroads must have the right to interchange and routing freedom. Contractual barriers affecting Class II and Class III railroads that connect with the merged or consolidated and consolidating carriers that prohibit or disadvantage full interchange rights, competitive routes, and/or rates, must be immediately removed by the carriers, and none imposed in the future. The merged or consolidated and consolidating carriers must maintain competitive joint rates through

existing gateways. Also, Class II and Class III railroads should be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage. Any pricing or operational restrictions that disadvantage connecting Class II or Class III railroads must be immediately removed by the merged or consolidated and consolidating carriers, and none imposed in the future. (c) Class II and Class III railroads that connect to the merged or consolidated and consolidating carriers must have the right to competitive and nondiscriminatory rates and pricing. Rates and pricing of the carriers that do not meet this standard must be promptly corrected by the merged or consolidated and consolidating carriers upon request by a connecting Class II or Class III railroad. (d) Class II and Class III railroads that connect to the merged or consolidated or consolidating carriers must have the right to fair and nondiscriminatory car supply. Car supply issues regarding this standard must be promptly addressed by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(6) TCS and GRR contend that the Board should encourage merger applicants to implement the foregoing conditions by negotiation with their Class II and Class III railroad connections in a mutually agreeable fashion. TCS and GRR further contend, however, that, if enforcement of the conditions is needed, the Board should have in place a mechanism whereby an expedited and cost-effective remedy can be pursued by a Class II or Class III railroad filing a complaint with the Board.

(7) TCS and GRR contend that, in considering future mergers and acquisitions, the Board, in determining whether the merger or acquisition is consistent with the public interest, should take into account the effect of the proposed transaction upon the merged or controlled and controlling railroad's ability to attract shippers, gain traffic, enlarge employment opportunities, and improve the marketing opportunities of suppliers of railroad equipment and materials. TCS and GRR further contend that future mergers and acquisitions should not be approved unless they clearly benefit and support those who have a stake in the proposed transactions: the senior officers of the railroads; the railroads' employees; existing rail customers; the merged or acquiring railroads' stockholders; connecting shortline and regional railroads; and rail equipment suppliers.

APPENDIX P: FOREST PRODUCTS, LUMBER, AND PAPER INTERESTS

American Forest & Paper Association. The American Forest & Paper Association (AF&PA)[169] contends that the proposed regulations should be revised so as to affirmatively enhance competition. AF&PA further contends that the Board should implement procompetitive policy changes to the maximum extent permissible under the Board's authority, should finish deregulation, and should permit marketplace actions to promote competition.

Competition. AF&PA, which believes that vigorous rail-to-rail competition is necessary for a healthy rail system, is concerned that the evolving oligopolistic national rail structure will not sustain a low-cost and efficient transportation infrastructure. AF&PA further contends: that vigorous competition between transportation providers, both within a mode and between modes, is the most effective way to ensure that needed low-cost and efficient transportation is available for the shipping public; that, without competition, there is no incentive for the railroads to provide consistent service levels, to improve and maintain low cost levels, and to furnish adequate supplies of quality boxcar equipment; and that, therefore, the Board's new policies and procedures should ensure that rail-to-rail competition exists to the maximum extent possible. And, AF&PA adds, it believes that the railroad industry should operate with the same economic incentives as any other business, including adherence to the antitrust laws.

Procompetitive reform principles. AF&PA contends that the "principles for reform of merger proceedings and related regulation" advocated by ARC[170] should guide the Board in its development of improved policies and procedures. AF&PA further contends that the need for improved and enhanced competition is so strong and immediate that the Board should use the full extent of its authority to revise its policies consistent with these principles. AF&PA argues that the Board's efforts in this proceeding should include, but not be limited to, all of the recommendations in the proceeding that would: increase competition among railroads; improve service and safety; and address any problems or flaws (present or future) that result directly or indirectly from rail mergers. AF&PA adds that, because the Board may not have the necessary authority to fully achieve comprehensive policy reform consistent with all of the reform principles advocated by ARC, the rail customer community will continue to press for congressional action that would provide the necessary legislative direction to achieve these principles.

Additional market-based processes. (1) AF&PA contends that shippers must have a real choice as respects the rail carriers with which they do business. AF&PA insists that, with rail

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[169] AF&PA is the national trade association of the forest products and paper industry.

[170] See NPR, slip op. at 249-50.

choice, additional market share could be achieved by the rail industry. And, AF&PA adds, competitive access to an alternative rail carrier, where operationally safe and feasible, would actively stimulate, not merely protect, existing competition. (2) AF&PA contends that shipper choice should be promoted through the adoption of terminal and reciprocal switching, using as a model the Canadian interswitching approach and its distance-based threshold. AF&PA further contends that Board involvement could be limited to instances where the carrier and shipper could not agree on the threshold or a fair rate. (3) AF&PA contends that, because railroads appear to focus on moving trains rather than on time-definite door-to-door services, "third party marketers" should be afforded the opportunity to develop such shipper-desired solutions. (4) AF&PA contends that the Board should support an alternative means of managing rail market behavior by the creation of common access points to create competition.

American Forest Resource Council. The American Forest Resource Council (AFRC),[171] which believes that its concerns were not adequately addressed in the NPR, contends that the new regulations should authorize the evaluation of any proposed merger on the basis of how it would affect service, competition, and market and trade neutrality.

(1) AFRC indicates that it has 3 major areas of concern, which AFRC believes should be addressed in any revision to the merger rules. (a) AFRC insists that the forest products industry cannot afford any more service disruptions or difficulties like those experienced in the last round of major railroad mergers. (b) AFRC insists that any future changes in the North American railroad structure should result in an increased level of competition among the railroads and not further oligopolistic situations that could negatively affect service levels and rates paid by shippers. (c) AFRC insists that any changes in the North American railroad structure should be both market and trade neutral.

(2) AFRC contends that there is not, in the NPR, any discussion of how the information that applicants must submit will be analyzed and used by the Board in its deliberations on a merger application. AFRC further contends that there is, in the NPR, no discussion of standards or methodologies that the Board would use in evaluating an applicant's submission or public comments on such. AFRC argues that, without these details, the proposed rules would appear to be nothing more than a large paper exercise, without substance or teeth.

Lumber Fair Trade Group. The Lumber Fair Trade Group (LFTG), which represents numerous independent wholesale distributors of forest products, indicates that its members deal heavily in lumber produced in Canada with over 50% of that lumber originating in British Columbia. LFTG contends: that, since the early 1990s, its members have been forced to accept

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[171] AFRC, a forest products trade organization, is the entity created by the recent merger of the Northwest Forestry Association and the Independent Forest Products Association.

terms of sale dictated by the British Columbia lumber mills, which include pricing on an FOB origin basis plus a mill-determined amount that is said (by the mills) to represent the mill's delivered freight cost to destination; that the mills refuse to sell FOB origin with freight for the buyer's account unless the buyer first obtains the written agreement of CN to publish contract rates for the buyer's account; that, however, CN refuses to publish contract rates for the buyer's account unless the buyer first obtains written agreement from the mills that they will sell to the buyer FOB origin; and that all efforts to break the gridlock created by this combination of policies on the part of CN and the British Columbia mills have been frustrated. LFTG adds that its members refer to the addition of unsubstantiated and overstated freight costs as "phantom freight."

LFTG further contends that its members would be particularly concerned if a foreign railroad were to acquire control of a substantial amount of U.S. rail capacity. LFTG explains that this concern reflects the fact that the current "phantom freight" practice is shielded from application of U.S. antitrust law by the retention, outside the United States, of all freight bills and accounting records (which, LFTG advises, would document rebates, allowances, foreign currency exchange, or other reductions in net freight cost). LFTG adds that the existence of this "shielding effect" is not merely LFTG's opinion; rather, LFTG explains, it is the position that has been stated to LFTG by the Departments of Commerce and Justice, the Federal Trade Commission, and the office of the U.S. Trade Representative.

LFTG believes that any merger, marketing alliance, or other combination or quasi-combination of railroads that involves foreign control of U.S. railroad property and/or routes must require retention of full and complete records within the jurisdiction of the Board and U.S. courts. LFTG explains that, if copies of the records are not retained and accessible in the United States, no U.S. law, regulation, or order can be enforced. LFTG therefore insists that the new merger rules should ensure adequate and direct records retention and accessibility within the jurisdiction of the United States. And, LFTG adds, it opposes the establishment of an expedited review period for rail mergers and supports the inclusion of rail marketing agreements and alliances in the merger rules.

Weyerhaeuser Company. Weyerhaeuser Company (Weyerhaeuser), a forest products company with facilities across North America, contends that, although the proposed rules are a potential "good start," much more substance is needed to address shippers' need for meaningful and effective rail-to-rail competition. Weyerhaeuser, which suggests that the Board should start with the acknowledgment that today all Class I mergers are anticompetitive, further contends: that the rules must place a heavy burden of proof on the applicants to establish a compelling reason to further decrease rail-to-rail competition; that merger approval must impose significant penalties on the applicants if they fail to deliver on the benefits promised by the merger; that the rules should include provisions that will ensure that applicants retain sufficient employees to respond to the shipping public during the transition period; that the Board, in approving any merger, must impose real competitive conditions that mitigate the inherent anticompetitive nature of the merger; that these conditions should include the opening of all industries within terminal facilities to any carrier providing service to that terminal; that any approval should ensure that all existing gateways remain open, not only from an operational standpoint but from a rate and service perspective as well; and that the rules must provide shippers with procedures that ensure swift and significant redress for a merged carrier's failure to meet the Board's conditions or to provide the promised benefits.

Promoting and enhancing competition. Weyerhaeuser, which believes that the Board should adopt a regulatory framework similar to the framework that currently exists in Canada, contends that the final merger approval framework should include the following components: terminal access (interswitching); maintenance of gateways and interchange; a swift arbitration process to resolve disputes; and service performance penalties for a merged carrier that fails to meet the service levels outlined in the pre-merger service plan.

Terminal access. Weyerhaeuser contends that the Board should adopt the Canadian "interswitching" system, which (Weyerhaeuser claims) would increase competition between railroads for traffic at a substantial number of locations throughout the United States. Weyerhaeuser argues that, if necessary, interswitching costs could be established yearly by the Board and consistently applied across the country. Weyerhaeuser further contends that, as in Canada, the interswitching zones should begin where competing lines intersect and should expand outward in mileage bands, which (Weyerhaeuser advises) will provide competitive rail service to many industries located outside of current terminal areas (many of which, Weyerhaeuser claims, were established over 50 years ago and therefore no longer reflect the true "commercial" area of a location). And, Weyerhaeuser adds, in order to protect shortline and regional railroads, the terminal access zone rules advocated by Weyerhaeuser should apply only to Class I railroads and not to shortline or regional railroads.

Maintenance of gateways. Weyerhaeuser contends that, in any merger proceeding between Class I carriers, the Board should require that all existing gateways remain open, from an operational as well as an economic standpoint. And, Weyerhaeuser adds, the Board should consider a "backward" analysis to see if gateways eliminated in past mergers should be re-established as conditions to new, proposed mergers, where applicable.

Arbitration process. Weyerhaeuser contends that, because the Board's formal complaint procedures are too expensive, too time consuming, and too inflexible to be useful in resolving service and competition issues for shippers, the Board should adopt the Canadian dispute resolution process known as "Final Offer Arbitration" (FOA). Weyerhaeuser argues that FOA, which requires that a dispute be resolved within 60 days and which provides that the decision of the arbitrator is final, is a simple and speedy process that will enable carriers and shippers to achieve expeditious resolution of their commercial disputes.

Service performance penalties. Weyerhaeuser, which notes that the service disruptions resulting from recent rail mergers imposed significant costs on shippers, contends that the Board should insist that any future mergers have reasonable and realistic penalties on the merged carrier for such failures. Weyerhaeuser further contends: that these penalties could take several forms, including specific reasonable financial penalties and substitute service; that the shipper would have the discretion of asking for the specific financial penalties outlined in the merger or the implementation of the 49 CFR 1146.1 "expedited relief for service emergencies" rules; that, for the financial penalty, the shipper would file for this relief and the carrier would have 30 days to pay the claim; that the short time period would make the penalty effective in incentivizing carriers as well as in providing timely economic relief to impacted shippers; and that, in order to make this penalty system effective and timely, the service standards subject to penalty should be specifically set by the Board as conditions to any merger approval. Weyerhaeuser adds that the regulations should also provide that, if a failure persists, there will be an immediate implementation of the 49 CFR 1146.1 rules, with only a threshold trigger. Weyerhaeuser explains that this would allow the shipper to receive service from an alternate carrier, alleviating the overall costs of the service disruption and reducing the carrier's service failure penalty.

Transnational mergers. Weyerhaeuser contends that any merger of a transnational nature must include a complete review of the data on both sides of the border. Weyerhaeuser explains that, without viewing this in a holistic and systemic manner, the Board would have an incomplete view of the potential impact of any merger and the impact of any downstream effects.

Other submissions. Weyerhaeuser advises that it supports the competitive enhancement proposals advocated by NITL, ARC, and AF&PA.

APPENDIX Q: CANADIAN SHIPPER INTERESTS

CPPA, COFI, and WCSC. The Canadian Pulp and Paper Association (CPPA), the Council of Forest Industries (COFI), and the Western Canadian Shippers' Coalition (WCSC)[172] support all modifications to the merger regulations that will substantially increase the burden on applicants to demonstrate that a proposed transaction is in the public interest and that will require applicants to demonstrate that the transaction will enhance competition as an offset to negative impacts resulting from service disruptions and competitive harms likely to be caused by the transaction.

General policy statement. CPPA, COFI, and WCSC contend that, because railroad rationalization to eliminate excess capacity has been largely completed and there are now only limited efficiencies and service improvements to be achieved from further downsizing, enhanced competition should be seen as the primary consideration in major rail consolidations. CPPA, COFI, and WCSC therefore insist that a revised general policy statement should give primary emphasis to enhanced competition and should place it first among the various criteria identified therein, i.e., enhanced competition, improved service, and greater economic efficiency. CPPA, COFI, and WCSC add that we should also adopt a rebuttable presumption that a major rail consolidation will substantially reduce the rail transportation alternatives available to shippers.

Competition. (1) CPPA, COFI, and WCSC contend that the final rules should explicitly state that the protection and enhancement of intramodal (i.e., rail-to-rail) competition will be a significant consideration in our assessment of all applications for major railroad consolidations. CPPA, COFI, and WCSC insist that it is not enough to recognize that the railroad industry is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure. (2) CPPA, COFI, and WCSC agree that, when evaluating the public interest, we should consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. CPPA, COFI, and WCSC explain that the ability to use co-operative endeavors such as "alliances" with other carriers requires careful scrutiny before a merger application, with its strong likelihood of diminished intramodal rail competition, should be authorized. (3) CPPA, COFI, and WCSC support the proposed changes to the balancing test to upgrade the importance of competition and to recognize that redundant capacity is no longer the issue it once was and that improved carrier efficiency should not have the overriding priority it once had.

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[172] CPPA represents companies that produce most of the pulp, paper, and paperboard manufactured in Canada. COFI is a forest industry trade association that represents 100+ companies that operate in British Columbia. WCSC's members ship Western Canadian natural resource-based products such as coal, sulphur, chemicals, oil seed products, and forest products. CPPA filed separately. COFI and WCSC filed jointly.

Other modifications. (1) CPPA, COFI, and WCSC support the proposed rule revisions respecting transitional service problems, the requirement for a detailed SAP with operational monitoring thereof, and a formal oversight process for at least the first 5 years to ensure that the applicants' representations are being fulfilled and that no unforeseen harms have arisen that may require remedial action. (2) CPPA, COFI, and WCSC also endorse the proposed revisions respecting cumulative impacts and crossover effects that will require applicants to anticipate, with as much certainty as possible, what additional Class I merger applications are likely to be filed in response to their own application and to explain how these applications, taken together, will affect the eventual structure of the industry and the public interest. CPPA, COFI, and WCSC add that, in view of the small number of remaining Class I carriers and the strong likelihood that they will participate in any major rail consolidation proceeding that is initiated, this modification will not result in undue speculation.

Transnational issues. CPPA, COFI, and WCSC contend that future merger applications involving major Canadian and Mexican railroads should require the filing of "full system" competitive analyses and operating plans incorporating the applicants' operations in Canada and Mexico. CPPA, COFI, and WCSC further contend: that we should consult with the relevant officials in other countries as appropriate to ensure that any conditions imposed on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party; and that, to enable the development of a complete record in all affected jurisdictions, our cooperation with Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination should include the coordination and exchange of data on the likely impacts and consequences of a major rail consolidation.

APPENDIX R: TRANSPORTATION INTERMEDIARIES

Transportation Intermediaries Association. The Transportation Intermediaries Association (TIA),[173] which believes that the NPR provides a positive outline on improving rail merger rules, contends that the Board: should include precise details on how future rail mergers will provide rail-to-rail competition; should enhance competition; and should provide protections to IMCs from discriminatory volume and bond requirements. TIA further contends that the Board's merger rules should provide for: immediate injunctive relief through an arbitration system; punitive damages; and reasonableness of rules. The public interest, TIA insists, requires a competitive rail system that provides consistent, reliable, and safe service at a fair price to both large and small customers that wish to use the system.

Cumulative impacts. TIA contends that merger applicants should be required to look at the cumulative impacts of mergers. TIA further contends that, when reviewing these impacts, merger applicants should be required to show how their merger will provide enhanced rail-to-rail competition. TIA argues that, because the burden of proof is on the merging railroads, they should be held to the higher standard of enhancing competition; it is not enough, TIA suggests, to merely preserve the competition that existed before the merger.

Accountability for promises. TIA contends that merger applicants should be held accountable for the promises made in merger applications. TIA further contends that the Board should consider adding penalties as a condition of future mergers if certain merger promises are not met.

Injunctive relief through arbitration. TIA contends that rail customers currently believe that there is no efficient, timely, and cost-effective way to review rate or access issues. TIA further contends that one way to correct this problem would be through an arbitration process.

Discriminatory practices. TIA contends that IMCs face increased discrimination due to rail mergers. TIA explains: that, when service deteriorates after a merger, rail carriers tend to reduce the amount of cars on-line; that, to do this, rail carriers go after their smaller customers while attempting to improve service to their larger customers; that, in this connection, rail carriers have raised annual volume minimums and bonding requirements; and that, as a result, many small to medium-sized IMCs have been forced off the rail system. The Board, TIA believes, should ensure that this rulemaking contains protections that allow continued access to both large and small customers. And, TIA adds, the use of arbitration would provide IMCs and other rail customers a timely and affordable remedy for alleged discriminatory practices.

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[173] TIA's 800 members include 49 intermodal marketing companies (IMCs).

CrossRoad Carriers Intermodal Co. CrossRoad Carriers Intermodal Co. (CRCIC) contends that, to promote competition and to protect the deregulated environment that exists today, the Board should provide mechanisms for the small-medium shipper to demand fairness and equality.

Enhanced competition. CRCIC contends that, although the NPR recognizes the need for enhanced competition, it does not specifically address CRCIC's previously stated concerns. CRCIC further contends that the Board should outline the specific standards and minimums necessary for approval; it is not appropriate, CRCIC argues, to leave competition remedies to the 4 mega-carriers.

Immediate injunctive relief. CRCIC contends: that, the larger the rail carriers become, the less important the small-medium shipper becomes; that, many times, new railroad policies and procedures have had significant adverse impacts on smaller shippers; and that, oftentimes, rail carrier changes that have had the potential of advantaging larger shippers or the rail carrier's own interest have been implemented without consideration of the financial or commercial impact on the smaller-medium shipper. The industry, CRCIC insists, needs an efficient and low-cost mechanism to put a hold on any such policy or procedure change until the full impact can be reviewed. And, CRCIC warns, the literal existence of some small-medium carload and intermodal shippers could be in jeopardy without such a tool.

Third party arbitration. CRCIC contends that the merger rules must also include a method for a third party to cost-effectively review the facts and to rule as to what is reasonable and fair. CRCIC argues that, although many railroad contracts have arbitration provisions, many others do not. The Board, CRCIC therefore insists, needs to provide a vehicle for small-medium shippers to bring a contract, rate, service, or equipment issue to an unbiased third party for expeditious arbitration (the arbitration, CRCIC contends, should be dealt with within 90 days of the filing, with completion within 120 days).

Removal of artificial barriers. CRCIC contends that, since 1996, the 4 largest U.S. railroads have created artificial barriers (excessive guaranteed volume requirements, exorbitant penalty provisions, and unnecessary bonding requirements) that have eliminated many small-medium shippers from the marketplace. CRCIC further contends that the Board should take a firm stand against these discriminatory barriers, which (CRCIC argues) have stifled rail growth and favored the larger shippers. CRCIC contends, in particular, that all small-medium shippers should be grandfathered back to 1996 levels.

Punitive damages. It is not enough, CRCIC insists, to establish the remedies CRCIC seeks; rather, CRCIC argues, the Board must also provide severe financial penalties (which CRCIC refers to as punitive damages) for not adhering to them. Abusive and manipulative actions by the railroads, CRCIC explains, can destroy small-medium intermodal and carload shippers, on whom (CRCIC adds) thousands of employees and their families rely for their livelihoods.

Twin Modal, Inc. Twin Modal, Inc. (TMI), which believes that the NPR represents a positive move toward improving the rail merger rules, commends the Board for recognizing the need to update the rail merger rules in view of the tremendous consolidation that has already taken place in the rail industry and the very real scenario of just two Class I carriers left to serve the country if further mergers are allowed.

Standards respecting enhanced competition. TMI contends that, although the NPR calls for enhanced competition as a standard for any future rail merger, it lacks any specificity on how this is to be accomplished. TMI insists that, if the United States is to have a healthy, competitive, and safe rail system, the Board must specify standards and safeguards to be met as a condition for merger approval.

Burden of proof. TMI contends that merger applicants should be required to demonstrate how rail-to-rail competition will be preserved or enhanced for shippers of all sizes, particularly small shippers and IMCs.

Arbitration. TMI contends that, because the cost of making a case before the Board is so high, small shippers and IMCs should be allowed to bring issues relating to contracts, rates, service, or equipment to an unbiased third party for binding arbitration. TMI further contends that such arbitration should be required to be concluded within 120 days of filing with the arbitrator.

Hold applicants accountable. TMI, which claims that railroads involved in previous mergers have made many promises that have failed to materialize, contends that the Board should consider imposition of punitive penalties on railroads that fail to deliver on material promises made during the merger application process.

Injunctive relief. TMI contends that, as railroads become larger, they impose policies and procedures (e.g., volume requirements, penalties for volume shortfalls, credit terms, and bonding requirements) that discriminate against, and adversely affect the ability to compete of, small shippers and IMCs. TMI further contends that shippers and IMCs need a prompt and affordable means to put a hold on any such policy or procedure change until the full impact can be reviewed.

APPENDIX S: MISCELLANEOUS PARTIES

Enron Corporation. Enron Corporation (Enron) contends that, although the policy objectives endorsed in the NPR are a step in the right direction, the NPR lacks the necessary specifics as to how these policy objectives are to be achieved. Enron further contends: that much more should be done; that many commenters, including Enron, submitted specific proposals to mitigate the competitive harms that will result as the rail industry consolidates into a few remaining railroads; that Enron, in particular, showed that the development of a secondary market for rail transportation capacity would mitigate many of the competitive harms that would result from further consolidation, and, in fact, would enhance the overall competitiveness of the rail industry; and that Enron therefore urged the Board to require applicants to explain in their applications the steps they have taken to implement such a secondary market. Enron argues that, although the NPR neither adopted Enron's proposal nor rejected it, the Administrative Procedure Act requires the Board to do more. That Act, Enron insists, requires the Board to respond to the important comments of the parties and to give its reasons for accepting or rejecting the comments. And, Enron adds, it again urges the Board: to require applicants in major rail merger, acquisition, and control proceedings to explain the steps they have taken to implement a secondary market for rail transportation capacity; and to take these steps into account in determining whether the applicants have adequately mitigated the competitive harms resulting from the merger.

Mayo Foundation d/b/a Mayo Clinic. (1) Mayo Foundation d/b/a Mayo Clinic (Mayo) indicates that its participation in this proceeding reflects its interests vis-à-vis the DM&E construction proposal. Mayo contends that the health services it provides enjoy considerable renown in no small measure because of the quality of life in the City of Rochester, MN; Rochester's peaceful environment, Mayo explains, is conducive to the treatment and healing that is vitally important to the thousands of patients and their families who rely on Mayo. Mayo further contends, however, that the quality of that environment is threatened by the DM&E construction proposal, which would transform DM&E from a grain-hauling regional carrier with modest traffic (presently 3 trains daily through Rochester) into an incessant round-the-clock presence (expected to involve 37 trains per day through the heart of Rochester and in close proximity to Mayo's facilities). Mayo insists that the issues addressed in this rulemaking proceeding are very much the same as those that are facing Mayo and others in the DM&E construction proceeding.

(2) Mayo contends that, both in merger cases and also in construction cases, the Board's current procedures do not address many of the relevant adverse community and environmental impacts. Mayo further contends that, in merger cases and construction cases alike: the Board must look much more closely at emergency service and public safety ramifications, and should commit sufficient resources and time to identify and provide for adequate mitigation or avoidance of public safety and environmental problems; the Board must assure that vital

community concerns are fully considered and adequately addressed with appropriate conditions; the Board must provide that the cost of mitigating adverse community and environmental impacts will be borne by the parties that stand to benefit from the action that the Board has been asked to approve; and the Board should withhold approval of applications involving a carrier with an adverse safety record unless there is clear and convincing evidence that safety performance will be raised to fully acceptable levels.

(3) Mayo contends that the NPR does not adequately address the concerns raised by communities and others that have been or will be adversely affected by merger or construction proposals. Mayo argues, in particular, that the NPR § 1180.1(f)(2) requirement that applicants submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases, though a step in the right direction, falls far short of addressing the very serious concerns that have been raised by responsible public agencies and communities that are dealing with adverse safety and environmental impacts from recent railroad mergers.

(4) Mayo contends that the Board should expand the scope of this rulemaking to encompass railroad construction proposals under 49 U.S.C. 10901. Mayo further contends that, in view of the overriding importance of public health and safety, the Board should similarly expand the scope of the SIPs rulemaking[174] to include construction proposals under 49 U.S.C. 10901.

(5) Mayo contends that the proposed merger rules should be expanded to make provision for Board approval of railroad alliances and adequate remediation of impacts resulting from such alliances. Mayo explains that railroad transactions that result in more train traffic with attendant impacts on emergency service and public health raise vital public interest issues that must be thoroughly considered and adequately remediated when necessary in the interest of the public.

North America Freight Car Association. North America Freight Car Association (NAFCA)[175] contends that the NPR § 1180.1(h) "service assurance" procedures are not adequate, and do not go as far as they should, to protect private car owners and operators from injury due to post-merger service failures.

(1) NAFCA argues that freight cars are an extremely significant asset to the railroad industry, in terms of essential operating utility and investment dollars alike. NAFCA further argues: that 54% of the revenue freight car fleet is supplied by noncarrier car owners (such as NAFCA's members); that non-railroad car ownership is an essential part of railroad

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[174] See NPR, slip op. at 18 n.10.

[175] NAFCA's 20+ members manufacture, own, lease, or operate private rail freight cars.

infrastructure; that, without private cars, railroad fleets would be incapable of sustaining present traffic levels; and that railroads have encouraged the development of noncarrier car fleets of various car types, in some cases without any concomitant fleet of railroad ownership (e.g., tank cars and specialty covered hopper cars) and in some cases to augment carrier equipment (e.g., grain cars and coal cars).

(2) NAFCA contends that, when shippers are faced with the need to acquire private cars, the determination of how many cars to obtain, and thus of how much of an investment to make, depends heavily on the operating capabilities and practices of the railroads that will handle the private cars. NAFCA further contends, however, that an inevitable consequence of post-merger service failures (NAFCA cites the BN/SF, UP/SP, and Conrail transactions in particular) is a slow-down in the handling of freight cars. NAFCA explains that, when there is such a slow-down, the shipper's investment in private cars is devalued, and, if production is not to be curtailed, the shipper must find alternate transportation (either supplemental private rail cars or premium truck service) to supplement the now inadequate car fleet. NAFCA claims, however, that, following the last several rail mergers, when expenses were incurred by shippers in the form of devalued private cars and the addition of supplemental car capacity, shipper claims to recover those damages were, in many instances, either summarily rejected or simply ignored.

(3) NAFCA contends that no segment of the shipping public should be required to bear the economic brunt of post-merger service failures without recourse; no merger, NAFCA argues, is worth that price to shippers. NAFCA further contends, however, that the NPR does little to resolve the predicament of shippers whose efforts to recover compensation have been rejected or ignored. Neither reports nor oversight meetings, NAFCA explains, will correct arbitrary carrier behavior. Nor, NAFCA adds, is the result under new rules likely to differ from past practices if the Board leaves it to a party to propose a remedy when the remedy is against the interest of that party.

(4) NAFCA therefore contends that NPR § 1180.1 should be revised to express the principle that carriers will be fully responsible for merger-related service failures, and should be further revised to include definite standards for the processing of claims (along the lines of the 49 CFR part 1005 "loss and damage claims" rules). NAFCA further contends that refusals to acknowledge claims formally and arbitrary claim rejections (for such reasons as "we do not entertain this type of claim" or "this matter is not our responsibility") should not be countenanced by the rules. And, NAFCA adds, each carrier should be required to process claims within a stated period of time and to provide substantive reasons for rejection (e.g., the injuries claimed have not been shown to be the result of a merger-related service failure).

(5) NAFCA also contends that the Board should adopt standards to assess carrier performance. NAFCA contends, in particular, that the Board should adopt rules that allow

shippers to make a prima facie showing of a deterioration in service by comparing pre-merger and post-merger average fleet performance.